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5  
6 UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION  
7

8 RE: ) Chapter 13  
9 DIANA L. KOSI, ) Case No.: 4:16-bk-40493  
Debtor(s) )  
10 Adv.Pro.Case No.:

11 DIANA L. KOSI, )  
Plaintiff, ) COMPLAINT

12 Vs. )

13 ROBERT FITZ-STEPHENS, an )  
14 individual; WINDELER )  
DEVELOPMENT GROUP, INC., a )  
15 California corporation; GLORIA )  
LITTMAN as Trustee of the )  
16 BYPASS TRUST OF D and G LITTMAN )  
TRUST; GORDON M. HINDS, an )  
17 individual; and DOES 1-10, )  
inclusive, )

18 Defendants )  
19 )  
20 )

1. OBJECTION TO CLAIM #2  
(WINDELER DEVELOPMENT  
GROUP, INC.)
2. NEGLIGENCE PER SE;
3. NEGLIGENT  
MISREPRESENTATION;
4. BREACH CONTRACTS;
5. According to the proof

21 DEMAND FOR JURY TRIAL

22 Plaintiff captioned above, by and through their attorney of  
23 record, bring this action against defendants ROBERT FITZ-  
24 STEPHENS, ("Fitz-Stephens"), WINDELER DEVELOPMENT GROUP,  
25 INC. ("Windeler"), GLORIA LITTMAN as Trustee of the BYPASS TRUST  
26 OF D and G LITTMAN TRUST ("Littman Trust"), GORDON M. HINDS  
27 ("Hinds") and DOES 1-10, inclusive, (collectively "Defendants")  
28

1 and allege the following on information and belief, except as to  
2 those allegations which pertain to the Plaintiff:

### 3 4 INTRODUCTION

5 1. DIANA L. KOSI (hereinafter, "Plaintiff" or "Debtor")  
6 believes and thereon alleges that this action is a core  
7 proceeding brought pursuant to 28 U.S. Code Section 157, as  
8 the action relates to the alleged claims of two secured  
9 creditors and counter-claims of the estate against those  
10 secured creditors.

11 2. Jurisdiction exists under 28 U.S.C. Section 1334. Venue  
12 is proper under 28 U.S.C. 1409 (a). The District Court has  
13 generally referred these matters to the Bankruptcy Court for  
14 hearing pursuant to 28 U.S.C. 157 (a) and applicable United  
15 States District Court of California General Orders.

16 3. Debtor owns and resides the subject a single family home  
17 jointly with her non-filing spouse, John Kosi. The property,  
18 commonly known as 3202 Ortega Avenue, Lafayette, CA 94549  
19 (the "Property"), with an estimated value of \$1.25 million.  
20 Three secured debts totaling \$\$683,886.34, and including  
21 undisputed property tax arrears of \$8,886.34, are listed on  
22 Schedule D. Debtor has no debts other than those listed on  
23 Schedule D.

24 4. ROBERT FITZ-STEPHENS, ("Fitz-Stephens"), is an individual  
25 residing in the State of California, licensed as a Broker by  
26 the California Bureau of Real Estate, subject to a  
27 "restricted" license following the entry of a Superior Court  
28 civil judgment related to consumer mortgage loan fraud.

5. WINDELER DEVELOPMENT GROUP, INC. ("Windeler") is

1 scheduled as the junior deed of trust holder of the Property.  
2 Windeler is a single shareholder California corporation and  
3 the alleged alter-ego of Fitz-Stephens. Fitz-Stephens has  
4 filed Proof of Claim #2 on behalf of Windeler for \$153,172.78.

5 6. GLORIA LITTMAN as Trustee of the BYPASS TRUST OF D and G  
6 LITTMAN TRUST ("Littman Trust"). The Littman Trust is  
7 scheduled as the senior deed of trust holder on the Property  
8 for the disputed amount of \$530,000.00. No Proof of Claim has  
9 been filed to date.

10 7. GORDON M. HINDS ("Hinds") is an individual residing in  
11 the State of California, licensed as a Broker by the  
12 California Bureau of Real Estate and registered as a Mortgage  
13 Loan Originator. Hinds is Fitzstephen's partner and engaged  
14 in the business of originating residential home mortgages.

15 8. Plaintiff is ignorant of the true names and capacities  
16 of defendants sued herein as DOES 1 - 10 inclusive, and  
17 therefore sue these defendants by such fictitious names.  
18 Plaintiff will amend this Complaint to allege their true names  
19 and capacities when ascertained. Plaintiff is informed and  
20 believe and based thereon alleges each of the fictitiously  
21 named defendants is responsible in some manner for the  
22 injuries to Plaintiff alleged herein and that such injuries  
23 as herein alleged were proximately caused by such defendants.

24 9. Plaintiff is informed and believes, and alleges thereon,  
25 that each Defendant is responsible in some manner for the  
26 occurrences alleged in the Complaint at all times mentioned  
27 and that Plaintiff's actual injuries were proximately caused  
28 by Defendants. Information regarding the actual extent of each  
Defendant's participation in the business practices alleged  
herein is within the sole and exclusive possession of

1 Defendants.

2 10. Plaintiff is further informed and believes, and  
3 alleges thereon, that each Defendant was the agent, servant,  
4 representative, and/or employee of their co-defendants, and in  
5 doing the things hereinafter alleged was acting in the scope  
6 of their authority as agents, servants, representatives,  
7 family members and/or employees, and with the permission and  
8 consent of their co-defendants.

9 11. Additionally, Plaintiff is informed and believe, and  
10 allege thereon, that each Defendant assisted, aided and  
11 abetted, adopted, ratified, approved, or condoned the actions  
12 of every other defendant and that each corporate Defendant, if  
13 any, was acting as the alter ego of the other in the acts  
14 alleged herein.

15 **STATEMENT OF FACTS**

16 12. Plaintiff hereby incorporates by reference the  
17 proceeding paragraphs as if the same were fully set forth.

18 13. On February 25, 2016, Diana Kosi (the "Debtor")  
19 commenced this bankruptcy case by filing a voluntary  
20 petition under Chapter 13 of the Bankruptcy Code  
21 ("Code") prior to a Trustee Sale of her home scheduled  
22 for February 29, 2016 by the Littman Trust.

23 14. Debtor and her husband have substantial equity in  
24 the Property, substantial income and no debts aside from  
25 those purportedly secured by the Property.

26 15. Since the filing of this case, Debtor has retained a  
27 real estate broker, prepared the Property for market,  
28

1 listed the Property for sale on the MLS, conducted open  
2 houses and is actively attempting to sell the Property.

3 16. The property was originally purchased by Windeler as a  
4 "non-owner occupied" investment from the Littman Trust,  
5 on or about June 8, 2016. The Property is subject to a  
6 \$600,000.00 purchase money Promissory Note (EXHIBIT A)  
7 made by Defendant Windeler in favor of Gloria Littman as  
8 Trustee of the Littman Trust. Per Section 14 of the  
9 Promissory Note, the "loan of funds evidenced by this  
10 Promissory Note was made and arranged by Robert Fitz-  
11 Stephens, ("Broker") within the meaning of article X V  
12 of the California Constitution and that Maker is paying  
13 Broker a commission for such services." The Promissory  
14 Note was executed by "Maker" Robb Fitz-Stephens  
15 "President" of Windeler.

16 17. At all times relevant, Fitz-Stephens held a re-  
17 instated "restricted" broker license. According to the  
18 California Bureau of Real Estate, Fitz-Stephens has a  
19 public record of discipline, license revocations and  
20 Superior Court jury findings of fraudulent practices  
21 *specifically related to consumer loan transactions.*

22 18. Title V of P.L. 110-289, the *Secure and Fair Enforcement for*  
23 *Mortgage Licensing Act of 2008* ("SAFE Act"), was passed on  
24 July 30, 2008. The SAFE Act is designed to enhance consumer  
25 protection and reduce fraud through the setting of minimum  
26  
27  
28

standards for the licensing and registration of state-licensed mortgage loan originators.

19. The SAFE Act requires state-licensed MLOs to pass a written qualified test, to complete pre-licensure education courses, and to take annual continuing education courses. The SAFE Act also requires all MLOs to submit fingerprints to the Nationwide Mortgage Licensing System (NMLS) for submission to the FBI for a criminal background check; and state-licensed MLOs to provide authorization for NMLS to obtain an independent credit report.

20. Because of his history of engaging in consumer mortgage fraud, Fitz-Stephens is disqualified to hold, and does not hold, a Mortgage Loan Originator License Endorsement pursuant to the provisions of the California Financial Code and the SAFE Act.

After enactment of SAFE Act, the Property has subsequently sold to Debtor and a consumer loan was arranged via a "creative financing" method concocted by Windeler President Robert Fitz-Stephens

21. When plaintiff expressed interest in buying the subject property, Fitz-Stephens represented himself as a "loan broker" and "financing" expert who possessed superior knowledge and experience in consumer mortgage lending.

22. Windeler, the Kosis and the Littman Trust, entered executed the Amendment to Promissory Note and Deed of

1     Trust (EXHIBIT B), on or about March 28, 2010. Therein,  
2     the Kosis took title to the Property from Windeler, paid  
3     down and assumed the balance of the debt (\$530,000.00)  
4     owed by Windeler to Littman and executed a "Straight  
5     Note" (EXHIBIT C) in favor of Windeler in the amount of  
6     \$145, 000.00.  
7

8     23. Pursuant to the Amendment, the Littman Trust note  
9     required interest only (reduced to 6%) payments and  
10    required a \$530,000.00 balloon payment on July 1, 2014.

11   24. The \$145,000.00 Straight Note in favor of Windeler  
12   required interest-only (6%) payments with a balloon  
13   payment due on June 1, 2015.  
14

15   25. Fitz-Stephens agreed to arrange the "creative financing",  
16   draft and negotiate all financing aspects of the transaction  
17   on behalf of the Kosis and represented that he had an insider  
18   agency relationship with the Littman Trust and claimed to be  
19   an experienced loan expert.

20   26. At all times relevant, Plaintiff and her husband reasonably  
21   relied on Fitz-Stephen's and Hind's greater personal  
22   knowledge, education, experience, and capacity in the area of  
23   consumer home financing.

24   27. At all times relevant, Plaintiff and her husband reasonably  
25   relied upon Fitz-Stephen's and Hind's proclaimed expertise and  
26   believed Fitz-Stephen's was acting on their behalf in a  
27   fiduciary capacity.  
28

1 28. Fitz-Stephens agreed to subordinate the Windeler note  
2 to the Littman note to facilitate the 2010 transaction.  
3 In addition, Fitz-Stephens promised the Kosis that he  
4 arrange a subsequent refinance loan and promised that he  
5 would later subordinate the Windeler note to allow  
6 payoff of the Littman note before it fully matured.  
7

8 29. At all times relevant, Fitz-Stephens provided advice and  
9 represented both the Littman Trust and the Kosis in the  
10 transaction and all subsequent amendments.

11 30. At no time did Fitz-Stephens or the Littman Trust  
12 provide Debtor with any of the consumer credit  
13 disclosures required by TILA, RESPA and California law  
14 prior to or after the consummation of this consumer  
15 credit transaction.  
16

17 31. Notwithstanding these licensing restrictions, Fitz-  
18 Stephens has regularly engaged in the business practice  
19 of arranging residential mortgages and receives  
20 compensation from other brokers, including Defendant  
21 Gordon Hinds.  
22

23 32. After taking title to the Property, the Kosis paid  
24 monthly payments to the Littman Trust and Windeler,  
25 through their designated servicer, Evergreen Loan  
26 Servicing.  
27  
28



1 Broker Robert Fitz-Stephens and his agents engaged in  
2 unauthorized mortgage origination practices, breaches of  
3 fiduciary duty and conflicts of interest that prevented  
4 Plaintiff from refinancing the Littman mortgage and  
5 caused financial harm to Debtor and her spouse.

6 33. That at all times relevant, Fitz-Stephens maintained  
7 a fiduciary relationship with the Kosis even years after  
8 the initial sale of the property and arrangement of  
9 consumer financing.

10 34. Fitz-Stephens approached the Kosis and proposed to  
11 arrange a refinance loan that would "Get Littman off  
12 your back" on or about May 14, 2013.

13 35. That Fitz-Stephens attempted to arrange and process  
14 a loan application for the Kosis, ran their credit and  
15 continued to advise them as a loan broker and a credit  
16 repair "expert".

17 36. Fitz-Stephens and Windeler remained primarily  
18 responsible to the debt owed to the Littman Trust and  
19 had an interest in facilitating its payoff. That Fitz-  
20 Stephens again represented to the Kosis that he was  
21 willing to subordinate his Windeler Straight Note in  
22 order to facilitate the refinance of the Littman Trust  
23 loan, provided that Fitz-Stephens and his agents would  
24 receive the loan broker commission.

25 37. That Fitz-Stephens continued to represent the Kosis  
26 in their dealings with the Littman Trust and its loan  
27  
28

1 servicer Evergreen. Fitz-Stephens represented the Kosis  
2 to resolve payment, property tax and insurance  
3 discrepancies, serving as a professional liaison. As  
4 a broker, Fitz-Stephens represented the Kosis in the  
5 negotiation of an extension of the Littman Trust balloon  
6 payment. While Fitz-Stephens never obtained a loan  
7 approval for the Kosis, he arranged a one-year extension  
8 of the maturity date of the balloon payments.  
9

10 38. On or about May 26, 2014, Littman Trust, Windeler,  
11 and the Kosis entered into a Second Amendment to  
12 Promissory Note and Deed of Trust (EXHIBIT C), wherein  
13 the maturity dates of both the Littman Trust and the  
14 Windeler Notes were extended through the month of July  
15 2015. The Kosis made all payments required under this  
16 new agreement.  
17

18 39. Again, Fitz-Stephens arranged, negotiated and drafted  
19 the agreement while purporting to serve as broker to  
20 both the Littman Trust and the Kosis. Fitz-Stephens  
21 again subordinated the Windeler Straight Note.  
22

23 40. In April 2015, the Kosis applied for a refinance  
24 loan with Infinity Home Loans and was subsequently  
25 approved. On July 6, 2015, Kosis obtained an approval  
26 for a 30 year 4.375% fixed rate refinance loan for  
27 \$553,600 from Infinity Home Loans, Inc. ("Infinity").  
28

1 41. The refinance loan approved by Infinity was  
2 conditioned on the subordination of the Windeler note.  
3 The Kosis were not eligible for a refinance "jumbo" loan  
4 large enough to pay off both the Littman Trust and  
5 Windeler debts if full.

6  
7 42. On July 7, 2015, following the Kosi's final payment  
8 contemplated in the Second Amendment to Promissory Note,  
9 the Littman Trust instructed Evergreen Loan Servicing  
10 not to accept any additional monthly payments from the  
11 Kosis; the balloon payment in the amount of \$530,000 was  
12 presumably due by August 1, 2015.

13 43. That Fitz-Stephens again promised John Kosi that he  
14 would agree subordinate the Windeler note. That the  
15 Kosis relied on Fitzstephen's promise and continued to  
16 pursue the Infinity refinance loan.  
17

18 44. In the 11<sup>th</sup> hour, Fitz-Stephens seemingly changed his  
19 mind and intentionally delayed execution of the  
20 subordination agreement. Fitz-Stephens informed  
21 Infinity Home Loans that he needed the permission of his  
22 client, the Littman Trust before he could agree to  
23 subordinate and that the Littman Trust had refused to  
24 provide authorization.  
25

26 45. On or about July 16, 2015, Fitz-Stephens demanded that  
27 the Kosis pursue and FHA loan in the amount of  
28 \$625,000.00 so that Windeler would receive some funds at

1 closing. Infinity indicated it was unable to approve the  
2 Kosis for an FHA loan in the amount of \$625,000.00.

3 46. On or about July 23, Fitz-Stephens demanded that the  
4 Kosis pursue and FHA loan in the amount of \$625,000.00  
5 through his partnership with Defendant Gordon Hinds, so  
6 that they could earn the loan commission instead of  
7 Infinity.  
8

9 47. As a condition to allow the subordination of the  
10 Windeler deed of trust, Fitz-Stephens demanded that the  
11 Kosis abandon its loan approval with competitor Infinity  
12 Home Loans, Inc. just days before the balloon payment to  
13 the Littman Trust was due.  
14

15 48. Fitz-Stephens vehemently promised the Kosis that he  
16 and Hinds would arrange a "better" loan than Infinity  
17 for a higher amount into to subordinate the remaining  
18 \$50,000 balance stating: "We are going for 625. You  
19 will still owe me 50 plus that we can put on as a  
20 second." "We are pulling a case file today and  
21 submitting tomorrow. Next is the appraisal. Gordon is  
22 going through the file and will ask you for updates".  
23

24 49. Fitz-Stephens reneged on his previous promises to  
25 subordinate and allow the Kosis to pay off the Littman  
26 Trust prior to default. The Kosis have repeatedly relied  
27 upon Fitz-Stephens representations and his stated  
28 expertise in arranging refinance loans and was left with

1 no other option to avoid defaulting on the Littman Trust  
2 loan then to abandon the Infinity Home Loans loan and  
3 allow Fitz-Stephens and Hinds to arrange an FHA loan.

4 50. Thereafter, Fitz-Stephens and Hinds began  
5 processing and arranging the Kosi FHA loan and acting as  
6 Mortgage Loan Originators.  
7

8 51. On July 27, 2016, Fitz-Stephens wrote: "if you are  
9 serious about getting a loan I need copies tomorrow, to  
10 pay stubs to W-2s to bank statements to tax returns when  
11 can I get them?" John Kosi responded: "I just emailed  
12 everything you requested."  
13

14 52. When John Kosi followed up on July 29, 2015,  
15 neither Fitz-Stephens nor Hinds responded. Thereafter,  
16 Kosi missed the deadline for the Littman balloon  
17 payment.

18 53. When John Kosi followed up on August 5, 2015, Fitz-  
19 Stephens responded "I should hear tomorrow. Looks like  
20 we will have to get a FHA loan to get the loan amount  
21 you need."  
22

23 54. Fitz-Stephens advised the Kosis to pay down two  
24 credit card accounts in an attempt to increase the  
25 Kosi's credit score and that he planned to delay  
26 rerunning credit reports until August 17, 2015.

27 55. On August 18, 2015, Fitz-Stephens requested credit  
28 card information from Kosi to pay for the cost of a

1 credit report. When Kosi learned that his credit score  
2 increased by 44 points, Fitz-Stephens claimed "that's  
3 what we do." Thereafter, Kosi received loan  
4 "disclosures" from Fitz-Stephens and Hinds and was  
5 instructed to sign them. Thereafter, Fitz-Stephens  
6 advised the Kosis that he would negotiate another  
7 extension with the Littman trust to allow him and Hinds  
8 more time to arrange the FHA loan.  
9

10 56. Fitz-Stephens and Hinds then abandoned the FHA loan  
11 application process and failed to ever obtain a  
12 determination one way or the other as to the approval of  
13 the FHA refinance loan.  
14

15 Through its broker Fitz-Stephens, Littman Trust agreed  
16 to a Forbearance Agreement, then breached the  
17 Forbearance Agreement when it rejected payments,  
18 instructed Fitz-Stephens to abandon the Kosi refinance  
19 and recorded of a Notice of Default

20 57. On or about September 8, 2015 Fitz-Stephens and Hinds  
21 informed the Kosis that they had arranged a Forbearance  
22 Agreement (EXHIBIT E) with Littman Trust to buy them  
23 more time to arrange the FHA loan.

24 58. Therein Littman agreed to forgo foreclosure until  
25 after October 31, 2015 in exchange for three additional  
26 payments of \$2,650.00.

27 59. Fitz-Stephens instructed the Kosis to send the  
28 additional mortgage payments provided for in the

1 forbearance agreement to Evergreen Loan Servicing.

2 Fitz-Stephens and Hinds delayed providing a copy of the  
3 Forbearance Agreement until September 24, 2015.

4 60. Concurrently, on September 8, 2015, Littman Trust  
5 agent Bill Burgoyne contacted Evergreen Loan Servicing,  
6 advised the loan servicer of the Forbearance Agreement  
7 and instructed it to resume acceptance of mortgage  
8 payments from the Kosis.  
9

10 61. The Kosis immediately sent payment pursuant to the  
11 Forbearance Agreement and relied on the representation  
12 that a Notice of Default would not be filed by Littman  
13 Trust so that the FHA refinance could be secured.  
14

15 62. Evergreen Loan Servicing received payment from the  
16 Kosis on September 11, 2015 but returned it with a  
17 letter indicating that the "Account has been locked by  
18 the seller. We are unable to accept any payments until  
19 we have a request from them in writing to remove the  
20 lock".  
21

22 63. The Kosis again sent payment pursuant to the  
23 Forbearance Agreement and relied on the representation  
24 that a Notice of Default would not be filed by Littman  
25 Trust.

26 64. Again, Evergreen Loan Servicing received payment from  
27 the Kosis on September 17, 2015 but returned it with a  
28 letter indicating that the "Account has been locked by

1 the seller. We are unable to accept any payments until  
2 we have a request from them in writing to remove the  
3 lock"

4 65. On September 23, 2015, Debtor contacted Evergreen Loan  
5 Servicing by phone and was inaccurately informed that no  
6 payments have been received, notwithstanding Evergreen's  
7 letters to the contrary.  
8

9 66. On September 24, 2015, Fitz-Stephens provided a copy  
10 of the Forbearance Agreement to Debtor which was  
11 immediately executed and returned.

12 67. On September 28, 2015, Debtor contacted Evergreen  
13 Loan Servicing by phone and was informed that payments  
14 had been received "but the payments are being returned."  
15

16 68. On or about September 28, 2015, Debtor's spouse  
17 contacted Littman Trust agent Terry Littman by phone and  
18 was informed by her that "sending payments isn't good  
19 enough", that the forbearance agreement would not be  
20 honored, that a \$31,000.00 "late fee" had been assessed  
21 and that a Notice of Default would be recorded.  
22

23 69. The Kosis continued to try to contact Fitz-Stephens  
24 and Hinds regarding the status of the FHA refinance  
25 loan; however each abandoned the FHA application and  
26 failed to provide a final determination in writing.

27 70. On or about October 26, 2015, the Littman Trust caused  
28 a Notice of Default to be recorded.



1 71. At the direction of the Littman Trust, Hinds and Fitz-  
2 Stephens failed to process the Kosi's FHA loan  
3 application.

4 72. Hinds and Fitz-Stephens waited until after the Notice  
5 of Default was recorded to arrange "hard money"  
6 refinance loan at double the interest rate for which  
7 Kosi had previously been approved.  
8

9 73. On November 4, 2015, Hinds informed John Kosi that the  
10 only loan available was a "hard money" loan at 9.5% with  
11 \$22,500.00 down and additional undisclosed broker fees.  
12 After he and Fitz-Stephens caused the foreclosure, Hinds  
13 defended the higher interest rate quoting: "your loan is  
14 in foreclosure and is considered to be in foreclosure  
15 because your lender stopped accepting payments.  
16

17  
18 **FIRST CAUSE OF ACTION**  
19 **OBJECTION TO CLAIM #2**  
20 **(Against Defendant "WINDELER")**

21 74. Plaintiff hereby incorporates by reference the proceeding  
22 paragraphs as if the same were fully set forth.

23 75. Debtor hereby objects to Proof of Claim #2 filed by  
24 "Windeler" (EXHIBIT F) and asserts that no evidence of the  
25 debt or of the security interest is provided as required.  
26 Proof of Claim #2 fails to provide itemization or calculation  
27 of the \$8,172.78 alleged as "interest due", or of the  
28 \$5,943.84 alleged as the amount necessary to cure any default  
as of the date of the petition.

1 76. Plaintiff alleges that Windeler is the alter ego of Robert  
2 Fitz-Stephens. That Fitz-Stephens is the sole shareholder  
3 and officer of Windeler. That Fitz-Stephens uses the assets  
4 of Windeler as his own, for personal use. That there exists  
5 such unity of interest and ownership that the separate  
6 personalities of Windeler and Robert Fitz-Stephens no longer  
7 exist.

8 77. That the acts herein alleged are treated as those of the  
9 Windeler corporation and Fitz-Stephens alone, it would  
10 sanction a fraud or promote injustice to uphold the corporate  
11 entity and allow the sole shareholder Fitz-Stephens to escape  
12 personal liability for the debt.

13 78. That any claim asserted by Windeler is subject to a right  
14 to set off for any remedies due to debtor for damages caused  
15 by Robert Fitz-Stephens, individually and in his capacity as  
16 an officer of and Windeler.

17 79. The filing of a Proof of Claim establishes the prima facie  
18 validity of a claim [see FRBP 3001(f)] unless it is overcome  
19 by evidence establishing a bona fide dispute concerning the  
20 validity of the claim. Once the prima facie validity is  
21 overcome, the ultimate burden of proof shifts to the  
22 claimholder. *In re Lundell*, 223 F.3d 1035, 1039 (9th Cir.  
2000).

23 80. Section 501 of Title 11 of the United States Code allows  
24 creditors a means to present their claims against a debtor to  
25 the bankruptcy court by filing a proof of claim. See 11 U.S.C.  
26 S 501. Whether such a claim for which a proper proof has been  
27 filed is "allowable" is a matter for determination pursuant to  
28 11 U.S.C. S 502 and the procedural rules governing the

1 bankruptcy courts. These rules and our case law have put in a  
2 place a general procedure to allocate the burdens of proof and  
3 persuasion in determining whether a claim is allowable.

4 81. A proof of claim is deemed allowed unless a party in  
5 interest objects under 11 U.S.C. S 502(a) and constitutes  
6 "prima facie evidence of the validity and amount of the  
7 claim" pursuant to Bankruptcy Rule 3001(f). See also Fed. R.  
8 Bankr. P. 3007. The filing of an objection to a proof of  
9 claim "creates a dispute which is a contested matter" within  
10 the meaning of Bankruptcy Rule 9014 and must be resolved  
11 after notice and opportunity for hearing upon a motion for  
12 relief. See Adv. Comm. Notes to Fed. R. Bankr. P. 9014.

13 82. Rule 3001 requires that a claim be supported by evidence  
14 and copy of the writing supporting the claim be attached.  
15 Here, no writings are attached. In addition to its principal  
16 amount, where a claim includes interest, fees, expenses, or  
17 other charges incurred before the petition was filed, an  
18 itemized statement of the interest, fees, expenses, or  
19 charges shall be filed with the proof of claim.

20 83. That Proof of Claim #2 fails to provide *any* supporting  
21 documentation evidencing the debt of the security interest.

22 **SECOND CAUSE OF ACTION**  
23 **NEGLIGENCE PER SE**

24 84. Plaintiff hereby incorporates by reference the proceeding  
25 paragraphs as if the same were fully set forth.

26 85. That at all times relevant Fitz-Stephens and Hinds were  
27 agents of Plaintiff, including but not limited to in the  
28

1 capacity as Brokers licensed by the California Bureau of Real  
2 Estate.

3 86. That Fitz-Stephens and Hinds are each obligated to comply  
4 with provisions of the California Financial Code and the SAFE  
5 Act and owed Plaintiff fiduciary duties

6  
7 87. Fitz-Stephens and Hinds violated provisions of the  
8 California Financial Code and the SAFE Act and said violations  
9 were a substantial factor in causing harm to Plaintiff

10 88. Fitz-Stephens and Hinds owed fiduciary duties to Plaintiff  
11 but failed to use reasonable care to prevent harm to  
12 Plaintiff.

13 89. That Fitz-Stephens and Hinds had superior capacity,  
14 knowledge, and experience in the area of consumer residential  
15 lending greater than Plaintiff and her husband.

16 90. That all Defendants are responsible for representations made  
17 directly to Plaintiff's husband John Kosi and intended and  
18 reasonably expected those representations would be repeated to  
19 Plaintiff.

20  
21 91. That at all times relevant Fitz-Stephens and Hinds were  
22 acting in the capacity as dual agents for the Littman Trust  
23 including but not limited to in the capacity as Brokers  
24 licensed by the California Bureau of Real Estate. That Littman  
25 Trust duly authorized Fitz-Stephens and Hinds to act on its  
26 behalf. As such, the Littman Trust is vicariously liable and  
27 therefore responsible for the harm to Plaintiff caused by  
28 Fitz-Stephens and Hinds.

1 92. That at all times relevant Fitz-Stephens and Hinds were  
2 acting in a capacity as dual agents of Windeler, including but  
3 not limited to in the capacity as Brokers licensed by the  
4 California Bureau of Real Estate. That Windeler duly  
5 authorized Fitz-Stephens and Hinds to act on its behalf. As  
6 such, the Windeler is vicariously liable and therefore  
7 responsible for the harm to Plaintiff caused by Fitz-Stephens  
8 and Hinds.

9 93. That Fitz-Stephens and Hinds were partners in the business  
10 of arranging consumer residential mortgages when they caused  
11 Plaintiff harm and are subject to the provisions of the  
12 California Financial Code and the SAFE Act. That Fitz-  
13 Stephens and Hinds authorized each other to act on their  
14 mutual behalf when they caused Plaintiff harm.

15 94. That Fitz-Stephens and Hinds were acting in their capacity  
16 as agents of Plaintiff, Windeler and the Littman Trust when  
17 they caused Plaintiff harm.

18 95. By inducing the Kosis into abandoning the approved  
19 Infinity loan, Hinds and Fitz-Stephens prevented the  
20 Kosi's from avoiding foreclosure.

21 96. By delaying processing of the Kosis' FHA loan  
22 application, Fitz-Stephens and Hinds prevented the  
23 Kosi's from avoiding foreclosure.

24 97. By abandoning Kosis' FHA loan application, Fitz-  
25 Stephens and Hinds sought to compel the Kosis into  
26 accepting a high interest, unaffordable hard money loan  
27 and prevent the Kosis from avoiding foreclosure.  
28

1 98. By attempting to represent themselves, the Littman  
2 Trust, Windeler and the Kosi family, Fitz-Stephens and  
3 Hinds engaged in a conflict of interest that resulted in  
4 harm to Plaintiff.

5 99. That Fitz-Stephens and Hinds actions and omissions  
6 prevented the debtor from obtaining a refinance loan,  
7 allowed the wrongful foreclosure by the Littman Trust to  
8 be initiated and necessitated the filing of this chapter  
9 13 to prevent further loss of equity.

11  
12 **THIRD CAUSE OF ACTION**  
13 **NEGLIGENT MISREPRESENTATION**

14 100. Plaintiff hereby incorporates by reference the proceeding  
15 paragraphs as if the same were fully set forth.

16 101. Fitz-Stephens and Hinds negligently misrepresented important  
17 facts to Plaintiff and her husband including, but not limited  
18 to: that Fitz-Stephens would agree to subordinate the  
19 Windeler note and allow payoff of the Littman loan prior to  
20 its default; that Fitz-Stephens and Hinds would provide a  
21 "better loan" than the approved Infinity loan; that Plaintiff  
22 was eligible for an FHA loan at \$625,000; that Fitz-Stephens  
23 and Hinds would work diligently to process and obtain approval  
24 of Plaintiff's FHA loan application; that Fitz-Stephens and  
25 Hinds had unique influence over the Littman Trust; that Fitz-  
26 Stephens and Hinds had negotiated Forbearance Agreement to  
27 extend the time needed for them to complete the FHA refinance  
28

1 and that the final FHA loan would not have an interest rate in  
2 excess of 5.5%.

3 102. Fitz-Stephens and Hinds stood in a fiduciary or similar  
4 relation of trust and confidence to Plaintiff and her husband.

5 103. Fitz-Stephens and Hinds successfully endeavored to secure  
6 the confidence of the recipient.

7 104. That Fitz-Stephens and Hinds secured had a relationship of  
8 trust and confidence with Plaintiff and her husband.

9 105. That Fitz-Stephens and Hinds opinions were each declared the  
10 matter to be true and are considered representations of fact  
11 because Fitz-Stephens and Hinds claimed to have special  
12 knowledge about the consumer mortgage financing not possessed  
13 by Plaintiff or her husband.

14 106. None of the aforementioned representations made by Fitz-  
15 Stephens and\or Hinds were true.

16 107. That Fitz-Stephens and Hinds had no reasonable grounds for  
17 believing theses representation was true when they made them  
18 to Plaintiff and her husband.

19 108. That Fitz-Stephens and Hinds intended that Plaintiff and her  
20 husband rely on these representations.

21 109. That Plaintiff and her husband reasonably relied on Fitz-  
22 Stephens and Hinds' representations;

23 110. That Plaintiff was harmed.

24 111. That Plaintiff's reliance on Fitz-Stephens and Hinds'  
25 representations were a substantial factor in causing Plaintiff  
26 harm.

27

28

**FOURTH CAUSE OF ACTION**  
**BREACH OF CONTRACTS**

**(Against "LITTMAN TRUST" "WINDELER and "FITZ-STEPHENS")**

112. Plaintiff hereby incorporates by reference the proceeding paragraphs as if the same were fully set forth.

113. Plaintiff claims that she and her husband entered into a contract with Windeler and its alter ego, Fitz-Stephens (Straight Note-EXHIBIT C).

114. That said contract included the provision that Fitz-Stephens would always allow the subordination of the note so as to allow a refinance and full payment of the Littman Trust note. Evidence of this term is provided by representations made by Fitz-Stephens and the actions of the parties reflected in previous agreements to allow subordination.

115. Plaintiff claims that she and her husband entered into a contract with the Littman Trust (Forbearance Agreement-EXHIBIT E) for the delay of foreclosure pending completion of the FHA refinance loan arranged by Littman Trust agents Fitz-Stephens and Hinds.

116. That the parties understood and agreed to the terms of these agreements; and the parties agreed to be bound before a written agreement was completed and signed.

117. That the terms of the Forbearance Agreement are clear enough that the parties can understand what each was required to do:

118. As to the Windeler contract, Fitz-Stephens was obligated to allow full subordination of the Junior note so that plaintiff could pay off the Littman Trust note and avoid default and foreclosure. That a reasonable person would conclude, from



1 the words, conduct and writing of each party, that there was  
2 an agreement to allow subordination.

3 119. As to the Littman Forbearance Agreement, the debtor was  
4 obligated to pay payments which were tendered and wrongfully  
5 rejected by Littman Trust's loan servicing agent, Evergreen  
6 Loan Servicing and by agent Terry Littman. The Plaintiff was  
7 excused from performance after Littman Trust twice refused to  
8 accept payment. That a reasonable person would conclude, from  
9 the words, conduct in writing of each party, that there was an  
10 agreement.

11 120. The Littman Trust was obligated to accept those payments and  
12 delay initiation of a non-judicial foreclosure so as to allow  
13 the Debtor the opportunity to complete the refinance process.

14 121. The Littman Trust refused to accept payment provided for  
15 in the agreement, prevented Debtor from establishing a  
16 mortgage payment history and prematurely initiated  
17 foreclosure. Each of these acts contributed to Debtor's  
18 inability to obtain conventional financing and necessitated  
19 this chapter 13. As such Debtor was harmed by Littman Trust's  
20 failure to perform its obligations under the Forbearance  
21 Agreement.

22 122. That Debtor made a good faith effort to comply with each  
23 contract; and that both Littman Trust and Windeler received  
24 essentially what their respective contracts called for because  
25 Debtor's failures, if any, were so trivial or unimportant that  
26 they could have been easily fixed or prevented by Defendants.

27 123. That the breach of the Straight Note and the subsequent  
28 breach Forbearance Agreement was a substantial cause of the

1 harm suffered by Debtor, including, but not limited to the  
2 loss of the opportunity to obtain conventional financing, the  
3 wrongful imposition of a \$30,000 late fee, the negative credit  
4 effects of a wrongful foreclosure, Chapter 13 Trustee fees and  
5 other consequences associated with the filing of this  
6 bankruptcy case.

7 **FIFTH CAUSE OF ACTION**

8 **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**  
9 **(Against "LITTMAN TRUST" "WINDELER and "FITZ-STEPHENS")**

10 124. Plaintiff hereby incorporates by reference the proceeding  
11 paragraphs as if the same were fully set forth.

12 125. In every contract or agreement there is an implied promise  
13 of good faith and fair dealing. This means that each party  
14 will not do anything to unfairly interfere with the right of  
15 any other party to receive the benefits of the contract;  
16 however, the implied promise of good faith and fair dealing  
17 cannot create obligations that are inconsistent with the terms  
18 of the contract.

19 126. Plaintiff claims that Defendants Littman Trust, Windeler and  
20 its alter ego of Fitz-Stephens violated the duty to act fairly  
21 and in good faith in their respective contracts (the Straight  
22 Note and the Forbearance Agreement)

23 127. That Plaintiff entered into a Straight Note contracts with  
24 Windeler and its alter ego of Fitz-Stephens.

25 128. That Plaintiff entered into contracts with Littman Trust and  
26 Windeler, including the Forbearance Agreement.

27 129. That Plaintiff did all, or substantially all of the  
28 significant things that the contracts required her to do or  
that she was excused from having to do those things].

1 130. That all conditions required for each of the Defendants'  
2 performance had occurred or was excused and that Defendants  
3 unfairly interfered with Plaintiff's right to receive the  
4 benefits of those contracts.

5 131. That Plaintiff was harmed by those Defendants' conduct. That  
6 the breach of the Straight Note and Defendants collective  
7 refusal to allow subordination so that Plaintiff could  
8 complete her Infinity Home Loan approved refinance and pay off  
9 the Littman Trust debt was a substantial cause of the harm  
10 suffered by Debtor.

11 132. Subsequently, the breach of the Forbearance Agreement and  
12 Defendants collective refusal to honor the forbearance  
13 contract and postpone foreclosure was a substantial cause of  
14 the harm suffered by Debtor.

15 133. Finally, the collusion between agents of the Defendants,  
16 obvious conflicts of interests and pursuit of self-interest  
17 prevented Plaintiff from receiving the benefit of these  
18 contracts and constitutes a substantial cause of the harm  
19 suffered by Plaintiff including, but not limited to, the loss  
20 of the opportunity to obtain conventional financing, the  
21 wrongful imposition of an estimated \$30,000 late fee, the  
22 negative credit effects of a wrongful foreclosure, Chapter 13  
23 Trustee fees and other consequences associated with the filing  
24 of this bankruptcy case.

25  
26  
27  
28

1 **PRAYER**

2 Plaintiff and her family are in the process of selling the  
3 Property pursuant to a bankruptcy plan of reorganization. At  
4 issue is the amount of debt, if any Littman Trust and Windeler in  
5 light of the setoffs to which Plaintiff is entitled.  
6

7 WHEREFORE, Plaintiff prays for judgment against Defendants,  
8 and each of them, as follows:

- 9 1) For compensatory damages according to the proof;  
10 2) For general damages in tort according to the proof  
11 3) For special damages according to the proof;  
12 4) For reasonable attorney fees and costs incurred in this  
13 action, according to the proof;  
14 5) For costs of suit incurred herein;  
15 6) For such other and further relief as the Court deems just  
16 and proper.

17 Respectfully submitted,

18 June 15, 2016

19  
20 By: 

21 Law Office of J. Arthur Roberts  
22 Joseph Arthur Roberts, Esq.  
23 Attorney for Plaintiffs  
24 Diana L. Kosi  
25  
26  
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